Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling	)	CG Docket No. 04-208

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC. AND NEXTEL PARTNERS, INC.

Nextel Communications, Inc. and Nextel Partners, Inc. (hereinafter "Nextel") hereby submit these reply comments[1] in further opposition to the National Association of State Utility Consumer Advocates' ("NASUCA") Petition for Declaratory Ruling ("NASUCA Petition"). The NASUCA Petition requests a prohibition on "any separate monthly fees, line items or surcharges" unless the charge is "expressly authorized by federal, state, or local governmental authority."[2] In addition, the NASUCA Petition seeks certain other restrictions on the ability of telecommunications providers to price and market their services.

In its initial comments, Nextel demonstrated that recent state legislation and regulation threatens Nextel's ability to provide a clear, concise billing statement that comports with both the Federal Communication Commission's ("FCC" or "Commission") Truth-in-Billing regulations and Nextel's voluntary compliance with

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[1] *See Public Notice, National Association of State Utility Consumer Advocates (NASUCA) Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format*, DA 04-1495, CG Docket No. 04-208 (rel. May 25, 2004); *see also* National Association of State Utility Consumer Advocates' (NASUCA) Petition for Declaratory Ruling Regarding Truth-in-Billing, 69 Fed. Reg. 42125-26 (July 14, 2004) (extending reply comment date to August 13, 2004).

[2] *See* National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling, CG Docket No. 04-208 (filed March 30, 2004) (hereinafter "NASUCA Petition").

CTIA-The Wireless Association's Consumer Code for Wireless Service.[3] Nextel noted, moreover, that NASUCA's proposed solutions are unlawful, administratively unfeasible and would only move the Commission further away from its goal of ensuring clear, national guidelines for billing statements for Commercial Mobile Radio Service ("CMRS") providers.[4] Accordingly, Nextel urged the Commission to use its broad authority over CMRS rates and rate structures to preempt state laws or regulations purporting to govern CMRS rates and rate structures, and preempt states' attempts at back-door CMRS regulation by adopting, if necessary, an exclusive set of narrowly-tailored guidelines governing CMRS rates, rate structures and billing practices.[5]

I. A BROAD CROSS-SECTION OF COMMENTERS AGREE THAT THE RELIEF SOUGHT IN THE NASUCA PETITION IS UNLAWFUL

In initial comments, a broad cross-section of participants in this proceeding stated that the relief sought in the NASUCA Petition suffers from numerous legal infirmities, including the impermissible restriction of lawful speech in violation of the First Amendment. In addition, almost all of the CMRS carrier commenters noted that the NASUCA proposal constituted unlawful CMRS rate prescription in violation of Section 332 of the Communications Act (the "Act").

A. Numerous Commenters Agree That the Relief Sought in the NASUCA Petition Violates the First Amendment

In its initial comments, Nextel noted that NASUCA Petition's proposal to regulate CMRS rate elements and prohibit associated cost-recovery fee labels would violate

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[3] *See* Comments of Nextel Communications, Inc. and Nextel Partners, Inc., CG Docket No. 04-208, at 12-19 (filed July 14, 2004) (hereinafter "Nextel Comments"). Unless otherwise noted, all other comments cited hereinafter were also filed in CG Docket No. 04-208 on July 14, 2004.

[4] *See id*. at 19-29.

[5] *See id*. at 30-47.

Nextel's political and commercial speech rights under the First Amendment to the U.S. Constitution.[6] Almost all of the carriers participating in this proceeding – including CMRS carriers such as Cingular, Verizon Wireless and U.S. Cellular – also observed that the NASUCA Petition contained fatal First Amendment infirmities.[7] These concerns were also noted by a number of trade associations representing broad sections of the telecommunications industry, such as the Coalition for a Competitive Telecommunications Market, CTIA – The Wireless Association ("CTIA") and the Rural Cellular Association ("RCA").[8]

Critically, even one party supporting NASUCA recognized the First Amendment bar to adoption of NASUCA's proposal. In its comments, the Ohio Public Utilities Commission ("Ohio PUC") noted that carriers and the Commission might "have concerns that the NASUCA proposal could be an unconstitutional infringement on the carrier's First Amendment right of free speech."[9] The level of concern expressed by such a broad range of participants, and the depth of legal support with which they expressed those concerns, indicates that the NASUCA proposals suffer from serious First Amendment

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6 *See id*. at 19-26.

7 *See, e.g.*, Cingular Wireless, Opposition to Petition, at 7 (hereinafter "Cingular Opposition") ("Moreover, line item charges are consistent with a carrier's constitutional right to let consumers know the cause of these costs. . . . Not letting consumers know how much of their bill goes towards recovering these costs is misleading. By providing such information in a surcharge, the public can decide, for themselves, what regulatory obligations further their interest and hold the government accountable accordingly."); Comments of Verizon Wireless, at 14-20 (hereinafter "Verizon Wireless Comments") (noting that the "ban that NASUCA proposes on commercial speech would prohibit even truthful carrier speech"); Opposition of United States Cellular Corporation, at 5-7 (hereinafter "U.S. Cellular Opposition").

8 *See* Comments of the Coalition for a Competitive Telecommunications Marketplace, at 9; Opposition of CTIA – The Wireless Association, at 17-21 (hereinafter "CTIA Opposition"); Comments of the Rural Cellular Association, at 9 (hereinafter "RCA Comments").

9 Comments of the Public Utilities Commission of Ohio, at 6 (hereinafter "Ohio PUC Comments"). The Ohio PUC suggested an "alternate solution" involving further disclosure and labeling of rate elements or fees on carrier billing statements.

infirmities. On that basis alone, the Commission must reject the relief requested in the NASUCA Petition.

B. The CMRS Comments Demonstrate That the Relief Sought in the NASUCA Petition Would Constitute Impermissible Rate and Rate Element Regulation

The NASUCA Petition requests, among other things, that the Commission prohibit the "pass-through" of any "fees, line items or surcharges," unless such amount is "expressly authorized by federal, state, or local governmental authority."[10] Like Nextel, many of the CMRS commenters noted that fees and line-items charged for service on CMRS billing statements are part of the overall "rate" "rate structure" or "rate elements," and thus fall squarely within the purview of Section 332(c)(3), which prohibits state or local regulation of rates.

NASUCA's proposal, therefore, faces two substantial legal hurdles. First, any Commission decision to regulate CMRS rates (an inevitable by-product of NASUCA's request) would require an FCC rulemaking to determine whether there are public interest justifications for reversing the Commission's 1994 decision not to regulate CMRS rates.[11] Second, if the relief sought in the NASUCA Petition were granted, state and local governments would have the ability to alter CMRS rate structures merely by deciding that they want to impose a fee on CMRS services, but prohibit its "pass-through." In response, CMRS carriers would likely have to create thousands of localized rate plans (in an attempt to impose the fees only on those customers in jurisdictions where the fees originate). This would Balkanize both the regional and national CMRS market. In

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[10] NASUCA Petition, at 68.

[11] *See* Nextel Comments, at 26-29.

addition, since many CMRS licenses and markets stretch well beyond state boundaries, these localized rate plans would almost certainly result in an unreasonable system where customers in one area end up "subsidizing" the taxes and fees levied in another jurisdiction.[12] Similarly, any attempt to continue providing service pursuant to national rate plans or a limited number of national and regional plans is certain to result in CMRS customers subsidizing one another's services. Almost all of the CMRS commenters agree that such a result would violate the core premise of Section 332(c)(3). Moreover, such prescriptions would seriously diminish the ability of CMRS carriers to effectively and efficiently compete on a regional or national level – as Congress intended when it passed Section 332(c)(3) as part of the 1993 Budget Act.[13]

II. THE CONTRADICTORY REGULATORY APPROACHES DELINEATED IN CERTAIN STATE COMMENTS FURTHER ILLUSTRATE THE NEED FOR A FEDERAL APPROACH TO REGULATION OF CMRS RATES, RATE ELEMENTS AND ASSOCIATED PRACTICES

In addition to the proposals contained in the NASUCA Petition, CMRS carriers also face a host of inconsistent state laws and regulations that seek to regulate rates, rate elements and the forms of carrier cost recovery for mandatory federal programs such as local number portability ("LNP") and E911 implementation. As Nextel noted in its initial

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[12] *See, e.g., Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2nd Cir. 1990) (affirming FCC denial of state consumer group complaint that a Connecticut-specific surcharge charges to AT&T's Connecticut customers for a Connecticut gross receipts tax was unreasonable and discriminatory under Sections 201(b) and 202(a) of the Act).

[13] *See, e.g.*, Comments of AT&T Wireless Services, Inc., at 4 ("Even had the Commission not spoken so plainly in the Truth-in-Billing Order and Contribution Order about carrier flexibility in cost recovery, NASUCA's request that the Commission prohibit all line item charges that are not "expressly mandated by federal, state or [local] regulatory action" would be barred by Section 332(c) of the Communications Act."); Verizon Comments at 11 (noting that "any attempt by a state to direct how CMRS providers recover contributions to state programs from their customers, in particular by forcing them to bury those charges in monthly access charges, would undermine the goals of Section 332(c)(3)"); Cingular Comments at 18 (noting that "the states and localities are precluded from regulating" rates and rate structures).

comments, both California and Minnesota have passed state laws or regulations that, in many respects, unlawfully regulate CMRS rate structures and go well beyond the measures promoted in the NASUCA Petition.[14] Furthermore, the comments of certain state regulators indicate that they view the relief requested in the NASUCA Petition as merely a starting point, and intend to impose additional, and often directly conflicting, requirements on CMRS carriers.

For instance, the California Public Utilities Commission ("CPUC") comments that the proposals in the NASUCA Petition " would greatly benefit those consumers in states that have not take [sic] these consumer protection steps," while still noting that the CPUC intends to enforce its "consumers' Bill of Rights and Consumer Protection Rules" on the state level.[15] Under one provision of that "Bill of Rights," all carriers are required to list "[a]ll mandated government taxes, surcharges and fees required to be collected from subscribers and to be remitted to federal, state, or local governments" in a separate section of a billing statement entitled "Government Fees and Taxes."[16]

In contrast, the Ohio PUC proposes an "alternate solution" that would require "carriers to disclose government approved charges and taxes in an area of the bill conspicuously labeled with the header 'Government Sanctioned Charges.'"[17] "[N]on-

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[14] *See* Nextel Comments, at 14-18. Since Nextel's comments were filed, the State of Arizona has joined the CMRS regulation frenzy by considering opening a new docket to "examine the billing practices of telecommunications providers in Arizona." Letter from William A. Mundell, Commissioner, Arizona Corporation Commission, to Chairman Marc Spitzer, Commissioner Jeff Hatch-Miller, Commissioner Mike Gleason, and Commissioner Kristin Mayes, dated August 5, 2004.

[15] Comments of the California Public Utilities Commission and the People of the State of California, at 7 (hereinafter "CPUC Comments").

[16] Public Utilities Commission of the State of California, Rules Governing Telecommunications Consumer Protection, General Order No. 168, Decision 04-05-057 in Rulemaking 00-02-004, at 18, Rule 6(g) (adopted May 27, 2004).

[17] Ohio PUC Comments at 8.

government sanctioned charges," on the other hand, would have to be placed in another section of the billing statement, along with a disclosure that: "These surcharges are charges imposed by the company to recover other costs of doing business and are not required by government."[18]

These are just two examples of differing approaches that states might take if they were free to do so. The problem this presents for national CMRS operations is an enormous practical one – each form of state billing presentation and line item treatment cannot be implemented using a uniform billing system on a national level. Significantly, any state-by-state approach would do nothing to assist consumer understanding of carrier billing statements – as NASUCA and certain state commissions claim. The proliferation of conflicting state laws and regulations require that the Commission take action to ensure that regulation of CMRS rates and rate elements remains exclusively with the FCC, as required by Section 332(c)(3).

III. THE COMMISSION MUST PRESERVE EXCLUSIVE FEDERAL JURISDICTION OVER REGULATION OF CMRS RATES, RATE ELEMENTS AND ASSOCIATED ISSUES

As Nextel noted in its initial comments, NASUCA deserves credit for bringing its concerns about rate structure and billing issues to the Commission.[19] However, the Commission must take action to *confirm* the unitary power over the CMRS industry Congress gave it in the 1993 Budget Act, and reject the NASUCA and state proposals that will only serve to disrupt wireless carriers' ability to provide competition and innovation on a national platform.

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18 *Id.*

19 *See* Nextel Comments at ii.

The Commission has ample authority under Sections 2(b) and 332 of the Act to confirm its exclusive authority over wireless carrier rate structures and billing issues – including state regulations that are mischaracterized as either "other terms or conditions," or "general business regulations" that are so targeted they can only apply to CMRS rates or rate structures. This FCC authority was highlighted by a number of participants in this proceeding. Leap Wireless ("Leap"), for instance, stated that: "On one point, Leap emphatically agrees with NASUCA: this issue is properly the FCC's to address."[20] To that end, Leap urges the Commission to confirm its existing authority under the Communications Act preempting "state authority to impose further regulations regarding line-item charges for regulatory impositions, or any other rate or billing practices by carriers."[21] Cingular's comments also noted this broad authority, and stated that in the process of interpreting Section 332(c)(3)(A) of the Act, the "Commission has found that the phrase 'rates charged' may include both rate levels and rate structures for CMRS and the states and local authorities are precluded from regulating either of those."[22]

On the other hand, none of the commenters supporting the NASUCA Petition made a substantial effort to demonstrate how the Commission could "delegate" its authority over CMRS rates and rate elements to states or localities, as the NASUCA Petition urges. The District of Columbia Office of People's Counsel ("OPC-DC"), for instance, cites Sections 201(b) and 202(a) as governing the "reasonable standard for rates

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[20] Comments of Leap Wireless International, Inc., at 16.

[21] *Id.*

[22] Cingular Opposition at 18.

and charges."[23] OPC-DC, however, makes no effort to describe how Sections 201(b) and 202(a) – which give the Commission authority to determine what constitutes "just and reasonable" rates and practices – provide the Commission with power to delegate its plenary authority to regulate CMRS rates or rate elements to each and every state and locality. Furthermore, the OPC-DC comments – like those of other proponents of the NASUCA Petition – completely fail to address Section 332(c)(3), which explicitly prohibits any state or local involvement in CMRS rate setting or rate element decisions.

As the comments of Nextel and numerous other CMRS providers demonstrate, state and local regulation of CMRS rates and rate elements in the manner urged by NASUCA would violate Section 332(c)(3) and threaten the ability of CMRS providers to effectively and efficiently market and offer competitive rate plans on a national basis as Congress plainly intended. The Commission's exclusive authority over CMRS rates and rate elements in undisputed. Accordingly, Nextel urges the Commission to reconfirm its exclusive authority in the area by expressly preempting state regulation of CMRS rates, rate structures and related issues concerning the use of line items for the recovery of regulatory expenses. This could include, if necessary, adopting a federal set of CMRS consumer protection rules that would occupy the field and preclude state regulation addressing the same issues.

[23] Comments of the Office of the People's Counsel for the District of Columbia, at 7 (hereinafter "OPC-DC Comments").

CONCLUSION

For the aforementioned reasons, Nextel again urges the Commission to reject the NASUCA Petition, and instead confirm its exclusive authority over CMRS rates, rate structures and related issues concerning recovery of regulatory expenses.

Respectfully submitted,

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